In the Singapore Privy Council case of *Lim Yam Hong & Co* v *Lam Choon & Co*,[6] it was held that it is impossible to treat statements by a witness as corroborating his own evidence, these being merely parts of that very evidence itself.

In the present case, PW4 was, at the material time, an undercover agent and, as such, an agent provacateur whose testimony would be protected under the provisions of s 40A (1) of the Act. Nevertheless, in view of his role it would be natural for him to support the prosecution case. Accordingly, out of court statements of the kind sought to be introduced here would, in my opinion, be of trifling weight. On the other hand, their prejudicial effect would be considerable. I would, therefore, in the exercise of my discretion exclude them as corroboration under s 157.

Looking back, it would be pertinent to say a few words about ss 27 and 159 of the Evidence Act 1950 as well as s 37A(1)(b) of the Act.

As regards s 27, decisions such as *PP* v *Khoo Boo Hock & Anor*[7] which stress the importance of a contemporary record of what really passed between an accused and a police officer as constituting information leading to a discovery must be read in their proper perspective. If this is done with a discerning eye, they can be readily distinguished on the ground that in those cases the police witnesses concerned were not undercover agents and the contemporary record recommended would be strictly limited to so much of such information as distinctly relates to such discovery and nothing more. Whereas, in the present case, the statements sought to be introduced were made by an undercover agent and purport to contain an exhaustive account of what passed between him and accused persons and they are sought to be introduced in examination-in-chief for the purpose of corroboration under s 157.

Having said that, however, I would hold that PW4 is at liberty to apply to the court to refresh his memory by reference to the statements in accordance with the requirements of s 159. On the other hand, the defence too may apply under ss 145(1) and 155(c) of the Evidence Act 1950, for leave to cross-examine PW4 by reference to his statements if they so wish. Needless to say, in either of these situations the applications will be considered on their merits.

As regards s 37A(1)(b), some arguments were pressed upon me by the learned deputy based upon my judgment in the unreported case of *PP* v *Omar bin Daud & Anor*[8] wherein I had admitted a contemporary note, being a record of cautioned interview of an accused person by a Deputy Superintendent of Police during an anti-drug trafficking raid at the house of the accused, 'on the ground that it was highly relevant and plainly admissible under s 157'. The circumstances in that case, however, were poles apart from those of the present case, since the note emanated from a police officer of no mean rank, the contents of which related to spontaneous verbal statements made by an accused person after a statutory caution was administered as soon as possible thereafter as required under s 37A(1)(b) of the Act.

It goes without saying that the evaluation of the testimony of PW4, in particular, the assessment of his credibility, reliability, and accuracy of recollection, like that of any witness in a criminal trial, is a task which can only be performed at the close of the case for the defence and after final addresses, unless, of course, that testimony suffers from the defect of being so inherently incredible that no reasonable person could accept it as being true. (See *Haw Tua Tau* v *PP*.[9]) Accordingly, nothing that I have said in this ruling should be construed as detracting from that principle.

Application disallowed.

Solicitors: *Karpal Singh & Co.*

Reported by *Mathavan Devadas*

Guannex Leasing Sdn Bhd v Sebastian & Anor

HIGH COURT (KUALA LUMPUR) — SUIT NO D2-23-842-87
ZAKARIA YATIM J
2 AUGUST 1990

Civil Procedure — Further arguments in open court — Whether application can be granted when there were no previous arguments — Rules of the High Court 1980, O 56 r 2(2)

The first and second defendants appealed against the registrar's decision to grant leave to the plaintiff to enter final judgment against the defendants. At the hearing of the appeal, the first defendant was present but without his counsel. The first defendant then asked for an adjournment in order to instruct new counsel. Counsel for the plaintiff objected on the ground that the appeal had already been adjourned three times for the same reason. The court refused to grant the adjournment and dismissed the appeal on the ground that the first defendant had about four months after discharging his solicitors to get new counsel and yet at the date of the hearing he had not done so; his request for a further adjournment to instruct new counsel was just an excuse to adjourn the hearing of the appeal. The first defendant then applied for further arguments in open court under O 56 r 2(2), and also lodged an appeal against the decision of the judge.

Held, dismissing the first defendant's application:

(1) As to whether the defendants were entitled to ask for further arguments in open court, it is clear that there must be an argument before the order is made in chambers, so that the party who asks for further argument must present his argument in addition to what has already been argued in chambers. The party must either introduce additional issues or authorities or develop its argument to a more advanced point for the consideration of the judge. If there has been no argument at all in chambers, O 56 r 2(2) does not apply.

(2) With regard to the order refusing to grant the adjournment, there was an argument but in this case further argument on the question of adjournment would not serve any purpose. In any event the first defendant only asked for further arguments in respect of the dismissal of the appeal. There was no argument at all on the appeal on the hearing date. Since there was no argument, O 56 r 2(2) could not be invoked.

[Bahasa Malaysia summary

Defendan yang pertama dan kedua telah merayu terhadap keputusan pendaftar untuk memberi kebenaran kepada plaintif untuk memasukkan penghakiman muktamad. Semasa perbicaraan rayuan, defendan yang pertama hadir tetapi tidak dengan peguamnya. Defendan yang pertama kemudiannya telah memohon untuk penangguhan supaya dapat memberi arahan kepada peguam baru. Peguam bagi pihak plaintif membantah atas alasan bahawa rayuan telahpun ditangguh tiga kali untuk tujuan yang sama. Mahkamah enggan membenarkan penangguhan dan menolak rayuan atas alasan bahawa defendan pertama mempunyai lebih kurang empat bulan setelah melepaskan peguamnya untuk mendapatkan peguam yang baru tetapi masih gagal berbuat demikian pada tarikh perbicaraan; permintaannya untuk menangguh perbicaraan untuk mendapatkan peguam baru merupakan satu alasan untuk menangguh perbicaraan rayuan. Defendan pertama kemudiannya memohon untuk membuat hujah tambahan di mahkamah terbuka di bawah A 56 k 2(2) dan juga menyerah-simpan satu rayuan terhadap keputusan hakim.

Diputuskan, menolak permohonan defendan pertama:

(1) Mengenai sama ada defendan berhak untuk meminta membuat hujah tambahan di mahkamah terbuka, adalah jelas bahawa mesti terdapat hujah yang telah dibuat di dalam kamar sebelum perintah boleh dibuat. Ini adalah untuk membolehkan pihak yang meminta untuk membuat hujah tambahan mengemukakan hujahnya sebagai tambahan kepada apa yang telah dihujahkan di dalam kamar. Pihak yang berkenaan mesti samada mengemukakan isu tambahan atau autoriti yang baru atau memperbaiki hujah ke tahap yang lebih matang untuk pertimbangan hakim. Jikalau tidak terdapat sebarang hujah di dalam kamar, A 56 k 2(2) tidak terpakai.

(2) Mengenai perintah yang tidak membenarkan penangguhan, memang wujud suatu alasan tetapi di dalam kes ini, hujah tambahan atas soal penangguhan tidak akan mendatangkan apa-apa faedah. Lagipun, defendan pertama hanya meminta untuk membuat hujah tambahan berkenaan rayuan yang dibuang. Tiada hujah langsung yang dikemukakan dalam rayuan berkenaan tarikh perbicaraan. Oleh yang demikian, A 56 k 2(2) tidak boleh dibangkitkan.]

[*Editorial Note:* The first defendant has appealed to the Supreme Court vide Civil Appeal No 03-52-90.]

Cases referred to

1 *Lee Ah Tee* v *Ong Tiow Pheng & Ors* [1984] 1 MLJ 107 (refd)

2 *Tan Eng Hoe* v *Liang Hooi Kiang* [1961] MLJ 119 (refd)

Legislation referred to

Rules of the High Court 1980 O 14 r 11, O 56 r 2(2)

S Asiriah (Ms) for the plaintiff.
Saran Singh for the first defendant.

Cur Adv Vult

Zakaria Yatim J: This is an appeal by the first and second defendants against the decision of the senior assistant registrar given on 20 December 1988 ordering that leave be granted to the plaintiff to enter final judgment against the defendants for a sum of $121,331.57 together with interest and costs.

At the hearing of the appeal on 30 January 1990, the first defendant was present but without his counsel. The second defendant was absent. The plaintiff was represented by their counsel, Miss Asiriah. The first defendant informed me that he had discharged his counsel and that he wanted to get a new one. He requested that the hearing of the appeal be adjourned to a new date. Miss Asiriah informed me that the appeal had been postponed three times previously. I refused to grant the adjournment and ordered that the appeal be dismissed with costs.

The following are my reasons for refusing to grant the adjournment. The notice of appeal was filed on 24 December 1988. As Miss Asiriah rightly said, the appeal had been postponed three times previously. The defendants were then represented by a solicitor from Messrs Venu Nair & Co, a firm of advocates and solicitors. The solicitors for both the plaintiff and the defendants were informed of the hearing date of 30 January 1990 by a letter written by the senior assistant registrar dated 3 November 1989. The solicitors for the defendants must have received the letter from the senior assistant registrar sometime during the first or second week of November 1989. The first defendant discharged his solicitor on 5 October 1989. In a letter dated 25 January 1990, Messrs Venu Nair & Co wrote:

> ... We confirm that we are no more acting for the abovenamed first defendant, Dr Mathew Sebastian (t/a Ashley Dental Clinic & Surgery), as the abovenamed first defendant had discharged us as his solicitors in conduct of this matter on 5 October 1989.
>
> In the circumstances we shall not be appearing on his behalf on 30 January 1990 ...

The first defendant had about four months to instruct another solicitor. Yet on the date of the hearing the first defendant said he wanted to get new counsel. This was just one excuse to adjourn the hearing of the appeal.

After taking into consideration the circumstances in this case I refused to grant the adjournment and since the first defendant did not proceed with the appeal I dismissed the appeal with costs. I do not think my order would defeat the rights of the defendants altogether. (*Lee Ah Tee* v *Ong Tiow Pheng & Ors*[1] at p 109.) In the first place, the first defendant was not entitled to insist that the appeal be adjourned until he was able to get a counsel of his choice. (See *Tan Eng Hoe* v *Liang Hooi Kiang*[2] at p 120.) He was in fact not interested in engaging new counsel. Three days after I made the order he

filed a notice of intention to act in person in this action in place of Messrs Venu Nair & Co. The second defendant too filed a similar notice on the same day. Secondly, the second defendant, who was absent, is entitled to apply to set aside my order dismissing the appeal in his absence under O 14 r 11 of the Rules of the High Court 1980. The first defendant is entitled to appeal, as he is doing now, against my decision to the Supreme Court.

The question that arises here is whether the defendants are entitled to ask for further argument in open court under O 56 r 2(2), which states:

> Any party dissatisfied with any order made by a Judge in Chambers may apply, at the time the order is made, orally or at any time within four days from the day of the order in writing to the Registrar, for the adjournment of the matter into Court for further argument, and on such application, the Judge may either adjourn the matter into Court and hear further argument, or may certify in writing that he requires no further argument. If the Judge hears further argument, he may set aside the order previously made and make such other order as he thinks fit.

Under r 2(2) there must be an order made in chambers and the party dissatisfied with the order may apply for further argument. The word 'further' must be read in its plain and ordinary meaning. According to *The Shorter Oxford Dictionary* (3rd Ed) Vol 1, p 820, the word 'further' means, 'To or at a more advanced point ... (2) To a greater extent ... (3) In addition ...'. From the definition of the word 'further' it is clear that there must be an argument before the order is made in chambers, if the party seeks further argument. If the matter is adjourned into open court for further argument, the party who asks for further argument must present his argument in addition to what has already been argued in chambers. The party must either introduce additional issues or authorities or develop its argument to a more advanced point for the consideration of the judge. If there has been no argument at all in chambers, r 2(2) does not apply.

In the present case I made two orders, viz an order refusing to grant the adjournment and an order dismissing the appeal with costs. With regard to the first order, there was an argument but in this case further argument on the question of adjournment would not serve any purpose. In any event, in his letter to the senior assistant registrar dated 3 February 1990, the first defendant only asked for further argument in respect of the second order. There was no argument at all on the appeal on 30 January 1990. Since there was no argument, r 2(2) could not be invoked. In the circumstances I refused to allow the application for further argument and issued a certificate under the said rule that I did not require further argument. The second defendant did not make an application for further argument.

For the reasons stated above the orders I made in chambers stand until and unless reversed by the Supreme Court and in respect of the second defendant until and unless set aside by this court.

Application dismissed.

Solicitors: *Yusof Lee Pathma & Marbeck; Saran Singh & Co.*

Reported by *Azra Moiz*

Asia Commercial Finance (M) Bhd v Pasadena Properties Development Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO D2-23-946-87
ZAKARIA YATIM J
31 JULY 1990

Civil Procedure — Appeal — Dismissal in default of appearance — Application to reinstate — Setting aside order — Rules of the High Court 1980, O 14 r 11

Civil Procedure — Extension of time — Further arguments — Affidavit giving reasons — Whether mistake of solicitor sufficient ground — Rules of the High Court 1980, O 3 & O 56

The plaintiff obtained summary judgment against all three defendants on 16 June 1988. On 21 June 1988 all defendants appealed to the judge-in-chambers. The first and third defendants failed to appear at the appeal either by their solicitors or in person, and both appeals were dismissed in default of appearance. The first and third defendants applied to have their appeals reinstated and the first and second defendants applied to enlarge time to apply for further arguments.

Held, dismissing the defendants' applications:

(1) The court will only allow reinstatement if the appeal was struck out. As both appeals were dismissed in default of appearance, the first and third defendants should have applied to set aside the dismissal. Order 14 r 11 of the Rules of the High Court 1980 applied to appeals. When the judge hears the appeal, he does so by way of rehearing. Alternatively, the defendants could have appealed against the whole of the decision of the judge-in-chambers.

(2) The court has a discretion whether or not to extend time. For the court to exercise its discretion, there must be an affidavit giving reasons why time should be enlarged.

(3) The mistake of the defendant's solicitors is not a sufficient reason to grant an extension of time. Neither was the first defendant's explanation that the third defendant was out of the country a sufficient reason to enlarge time.

[Bahasa Malaysia summary

Plaintif telah mendapat penghakiman terus terhadap kesemua defendan-defendan pada 16 Jun 1988. Pada 21 Jun 1988 defendan-defendan yang berkenaan membuat rayuan kepada hakim-dalam-kamar. Defendan pertama dan ketiga gagal untuk menghadiri rayuan itu samada secara bersendirian atau melalui peguam dan rayuan mereka ditolak kerana keingkaran